IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. [redacted]41

A. L. MECHLING BARGE LINES, INC., a corporation, MISSISSIPPI VALLEY BARGE LINE COMPANY, a corporation, THE OHIO RIVER COMPANY, a corporation, and BLASKE, INC., a corporation,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants-Appellees.

BRIEF OF PLAINTIFFS-APPELLANTS.

EDWARD B. HAYES
WILBUR S. LEGG
Attorneys for Plaintiffs-Appellants

Of Counsel:
LORD, BISSELL & BROOK
135 South La Salle Street
Chicago 3, Illinois
RAndolph 6-0466

Date Due: August 25, 1961

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

TABLE OF CASES.

PERIODICALS.

CONSTITUTION AND STATUTES.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. 667

A. L. MECHLING BARGE LINES, INC., a corporation, MISSISSIPPI VALLEY BARGE LINE COMPANY, a corporation, THE OHIO RIVER COMPANY, a corporation, and BLASKE, INC., a corporation,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants-Appellees.

BRIEF OF PLAINTIFFS-APPELLANTS.

This appeal is filed on behalf of A. L. Mechling Barge Lines Inc., Mississippi Valley Barge Line Company, The Ohio River Company and Blaske, Inc. These appellants will sometimes hereinafter be referred to as "Barge Lines." This Court by Order dated April 3, 1961, has postponed consideration of its jurisdiction to the hearing of the case on the merits.

OPINION BELOW.

The opinion below of the three-judge United States District Court for the Eastern District of Missouri, Eastern Division, has not been reported, but appears at R. 61-65.

The orders of the Interstate Commerce Commission sometimes referred to herein as the "Commission," dated January 9, 1959, July 17, 1959, August 7, 1959, and September 10, 1959, were attached as Appendices to the complaint and appear at R. 14-19.

JURISDICTION.

This action was brought under 28 U.S.C. §§ 1336, 1398, 2284, 2321-2325, and 5 U.S.C. §1009 to set aside and enjoin an order of the Interstate Commerce Commission and also under provisions of 28 U.S.C. §2201 and 5 U.S.C. §1009 for a declaratory judgment to settle important questions relating to the power of the Commission (over the written protests of competing regulated carriers) to enter orders relieving railroads from the long-and-short haul prohibition of Section 4 of the Interstate Commerce Act, 49 U.S.C. §4, without making the investigation which the statute requires and the Commission specifically finds necessary and without making any factual findings whatever that the statutory prerequisites for such relief exist. The decree of the District Court was entered on September 16, 1960. The Barge Lines filed their Notice of Appeal on October 21, 1960.

The jurisdiction of this Court on direct appeal from the order of the three-judge United States District Court is confirmed by 28 U.S.C. §1253, and the time for filing notice of appeal is fixed at sixty days by 28 U.S.C. §2101(b).

The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal in this case:

Interstate Commerce Commission, 330 U.S. 567 (1947);

Dixie Carriers v. *United States*, 351 U.S. 56 (1956).

CONSTITUTION AND STATUTES INVOLVED.

The following constitutional provisions and statutes are involved:

United States Constitution, Amendment V;
United States Constitution, Article I, Section 1;
The National Transportation Policy, 49 U.S.C., note preceding Section 1;
Section 4, Interstate Commerce Act, 49 U.S.C. §4;
Section 8, Interstate Commerce Act, 49 U.S.C. §8;
Section 8 (b), Administrative Procedure Act, 5 U.S.C. §1007 (b);
Section 10, Administrative Procedure Act, 5 U.S.C. §1009;
The Declaratory Judgment Act, 28 U.S.C. §§2201-2202;
28 U.S.C. §§2321-2325.

These are set forth in the Appendix.

QUESTIONS PRESENTED.

The questions presented by this appeal are as follows:

1. May the Commission over due and timely protests filed by these adversely affected Barge Lines, among others, lawfully authorize the rail carriers intervening herein forthwith to charge new rail rates, which do not comply with the long-and-short haul prohibition of Section 4 of the Interstate Commerce Act, by entering orders which

(a) make no findings of fact whatsoever disclosing the basis for such authorization or showing compliance by such Fourth Section "departure" rates with the standards, requirements, and conditions of Section 4 or any other sections or provisions of the Interstate Commerce Act;

(b) provide that at some unstated future date the Commission will conduct a hearing to determine whether such rates comply with the statutory standards, conditions, and requirements under which the Commission is empowered to authorize them; and

(c) expressly withhold the Commission's approval of such rates.

2. May the Commission over due and timely protests filed by these adversely affected Barge Lines, among others, lawfully enter such orders without an investigation that enables it presently to approve said departures from the long-and-short haul requirement of Section 4 of the Interstate Commerce Act as lawful under the conditions, standards, and requirements of that Act, especially Section 4 and the National Transportation Policy?

3. During the pendency of these Barge Lines' properly filed action to review by injunction and declaratory judgment such an order of the Commission, can the intervening railroads, by filing new rates to eliminate the subject fourth section departures and by withdrawal of their fourth section applications for the avowed purpose of avoiding such judicial review, remove such review from the judicial power of the United States when

(a) the Commission does not vacate the order;

(b) these Barge Lines have duly alleged that the Commission has repeatedly entered such orders to their injury; and

(c) neither the Commission nor the railroads deny the Commission's practice of entering such orders nor give any assurance or evidence that the Commission will not continue to enter such orders in the future?

4. Can these Barge Lines lawfully be deprived by said device of judicial review of the Commission's unvacated "temporary" order, leaving it to stand as a defense for the intervening railroads to any proceeding by these Barge Lines against the railroads for the unredressed injury caused by the railroads' said departure rates?

5. Has the United States consented to the use of a declaratory judgment in cases such as this one, and does 28 U.S.C. §2321 prohibit the use of a declaratory judgment in such circumstances?

STATEMENT OF THE CASE.

The proceeding below was brought before a statutory three-judge court to enjoin an order of the Interstate Commerce Commission as unlawful. It sought both an injunction and a declaratory judgment. It expressly challenged the continuing practice of the Commission to enter such orders, of which the order complained of is admittedly an instance, as unlawful and injurious to the appellants.

On or about December 4, 1958, certain railroads filed with the Interstate Commerce Commission an application asking the Commission's authority to depart from the prohibition of the Interstate Commerce Act against lower rates for larger hauls. It was docketed by the Commission as Fourth Section Application 35140. (R. 4-5)

These were railroads serving the northern Illinois grain producing area, and railroads operating east from Chicago. They are hereafter collectively referred to as the Railroads.

The rates for which the Railroads' application sought the Commission's authorization were rates on grains from northern Illinois to the east via Chicago. They were lower than the then current rates for shorter rail hauls from inter-

mediate rail origin points east of Chicago to the same eastern destinations on the same rail lines and routes.

The occasion for the Railroads' application for the Commission's authority was that such lower rates for larger hauls are prohibited by Section Four of the Interstate Commerce Act subject to the provision that the Commission upon application, "after" investigation and in "special cases," may authorize carriers to charge such rates, and prescribe the effect to which they may be relieved from the prohibition against them made by that Section, "but in exercising the authority conferred upon it in this provision, the Commission shall not permit the establishment of any charge from or to a more distant point that is not reasonably compensatory for the service performed." Section Four was by the Transportation Act of 1940 (amending the Interstate Commerce Act and, for the first time, bringing water carriers within the Commission's jurisdiction) subjected to the National Transportation Policy (54 Stat. 899, 49 U.S.C. note preceding Sec. 1) by the provision that: "All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Appellant Barge Lines are water carriers, authorized under the Transportation Act of 1940, who compete with the Railroads for the Chicago leg of the grain traffic to the east from these northern Illinois origins (but not from the intermediate origins east of Chicago from which higher rail rates obtained than those proposed for the longer haul from northern Illinois).[1] (R. 3)

---

[1] This is the same grain traffic involved in Interstate Commerce Commission v. Mechling, 330 U.S. 567 (1947). In that case the Railroads proposed to reduce the rate differential between barge-rail and all-rail transportation to the east

Waterways Freight Bureau representing the appellant barge lines, appellant A. L. Mechling Barge Lines Inc., individually, and numerous shippers protested to the Commission against grant of the authority to depart from the Fourth Section for which the Railroads had thus applied. These protests made factual allegations showing that statutory conditions did not exist for granting the authority for which the Railroads applied. (R. 5-6)

On January 9, 1959 the Commission entered an order for an investigation of "all matters and issues with respect to the lawfulness of said rates • • •" and the matter was thereby "assigned for hearing at a time and place to be hereafter fixed." (R. 6, 7)

On the same day, January 9, 1959, the Commission entered as "Fourth Section Order 19059" a further order (set forth at R. 14, 15) stating that, *effective the following day,* January 10, 1959, the Railroads were thereby authorized to "establish and maintain" the said rates, (according to their application, to maintain the same "without observing the long-and-short-haul provision of Section 4 of the Interstate Commerce Act," etc.) until the further order of the Commission "to be entered after hearing in said fourth-section application No. 35140."

This order contained *no finding of fact whatever.* By like supplemental orders entered on similar Railroad applications, the origin territory covered by those Fourth

---

[1] (Continued)
from northern Illinois, by higher rates to the east on grain that had reached Chicago by barge. Here, they proposed to reduce the differential between barge-rail and all-rail transportation from northern Illinois to the east by lower through rates on the long haul from northern Illinois than on their shorter hauls on local rates from all-rail origins east of Chicago. Cf. **Interstate Commerce Commission v. Mechling, supra,** 330 U.S. 567 at 574, 577, 579-580.

Section departure rates was slightly extended (R. 15-16). (The original order together with the supplements shall hereafter be referred to collectively as F.S.O. 19059).

It has become the practice of the Commission to enter such orders authorizing rail carriers (over the protests and to the injury of these competing water carriers) to establish rates that depart from the long-haul-short-haul requirement of the Fourth Section of the Interstate Commerce Act at the same time that it orders an investigation and without making any findings of fact, to be effective until such time as the Commission may enter a further order. (R. 11, Par. 19)

The effect of these rail rates which the Commission thus authorized without any finding established and maintained without regard to the long-haul-short-haul provision of the Fourth Section of the Interstate Commerce Act, was forthwith to divert from appellant barge lines to the Railroads, business to Chicago which, but for said rates, the barge lines would have handled (R. 10, Par. 17; and see R. 59-60).

After these rates had been in effect for about six months the Commission finally held hearings, and the record was closed in mid-July, 1959. The Commission still made no finding that the record made at the hearings enabled it to approve these rates under the standards of the Interstate Commerce Act that govern the Commission's exercise of its authority to authorize departures from the long-haul-short-haul prohibition of the Fourth Section. (The order "authorizing" them had expressly disclaimed "approving" them.) The rates, and their injury to appellants, continued for yet another three months, and more. Meanwhile the Railroads asked the Commission

to reopen the record that had been closed the previous July, and on October 28, 1959, the Commission reopened the record over the appellants' objection.[2] (Rec. 7-8)

These barge line appellants and Cargill, Inc., thus, on November 16, 1959 instituted this proceeding before the statutory three-judge court below.[3] Their complaint set forth the above facts (R. 1-10) and the continuing practice of the Commission to enter such orders, as here, without any findings of fact, to the repeated injury of appellants (R. 11). It prayed an adjudication that F.S.O. 19059 is unlawful, void, beyond the power of the Commission, arbitrary, unsupported by essential findings, and asked for an injunction annulling and enjoining the operation of said order, for a declaratory judgment against the practice of the Commission to enter such orders without any findings of fact, and for general relief (R. 12-13).

The United States and the Commission filed an answer. The Railroads, as intervenors, also filed an answer. These answers insisted on the lawfulness of the Commission's said procedures. None of the defendants or intervenors was able to deny any of the factual allegations of the complaint, except that the Railroads (not the Commission and the United States) denied the substantial injury alleged in paragraph 17 of the complaint (R. 28-32, 35-40). The extremely severe injury to appellant A. L.

---

[2] The answer of the United States and the Commission states that the matter was set for further hearing on February 1, 1960 (R. 31). The answer of the intervening Railroads discloses that such further hearing had been postponed without day (R. 38).

[3] The court was convened pursuant to 28 U.S.C. §§ 1336, 1398, 2284 and 2321-2325, inclusive (R. 12).

Mechling Barge Lines Inc. was stated in an affidavit of its executive vice-president, F. A. Mechling, in support of Appellants' Motion for Summary Judgment in the court below (R. 59-60). (There was no contrary showing.) Neither answer denied that "the Commission, as here, still follows the practice of entering such orders without supporting finding", as alleged in paragraph 19 of the complaint (R. 11, 31, 39). Recent instances of the practice injuring appellants are set forth in the affidavit of Wesley A. Rogers in support of Appellants' Motion for Summary Judgment in the court below (R. 54). (There was no contrary showing.)

After this proceeding had been pending in the court below for over four months and before evidence was taken, on March 28, 1960, the Railroads notified the Commission that, effective March 10, 1960, they had now reduced the intermediate rates so that these intermediate rates did not exceed the rates from the more distant points and that they withdrew their Fourth Section Application (R. 45-48). On March 31, 1960, the Commission permitted the withdrawal of the application, *but did not* vacate F.S.O. 19069 (R. 48) under the "authority" of which the Railroads had maintained the rates departing from the long-haul-short-haul requirement of Section Four to the injury of appellants for fourteen months, from January 10, 1959 to March 10, 1960, without any findings of fact by the Commission showing that its authorization of said rates was in accordance with the standards and requirements of the Interstate Commerce Act for such authorization.

The Commission and the Railroads then moved the court below to dismiss the case as one presenting no controversy (R. 40-49).[4] Appellants moved for a summary judgment, filing supporting affidavits (R. 50-60).

The lower court dismissed the case as one that presented no controversy, and that was, therefore, beyond the power of the federal courts (R. 64, 65).

---

[4] Court reports show that this has become one of the standard maneuvers of the Railroads and the Commission, when challenge of "temporary" orders, authorizing departure from the Fourth Section without making any findings of fact, seems about to encounter judicial determination. The instant case is the first in which the injured water carriers have resisted it on the ground, now apparent (and here admitted) that the entry of such orders, as here, has become a continuing practice of the Commission. Cf. Jurisdictional Statement, pages 10, 11, and Reply to Motions to Affirm, pages 4, 5.

ARGUMENT.

Introduction

Reference to rate orders of the type here complained of as "temporary" is part of what has been called the jargon of transportation, but it should not obscure the reality that every rate order is subject to the further orders of the Commission, and that every order authorizing a rate is final for the period of its duration. The orders in question are frequently in effect four to five months before the Commission even holds any hearings on them. A "temporary" rate order of shorter duration was held to be final and reviewable in *Prendergast* v. *New York Telephone Company*, 262 U.S. 43 (1933) because the temporary rates "were final legislative acts as to the period during which they should remain in effect pending the final determination." (Id., 262 U.S. at p. 49.)

These orders are the diametrical opposite of the "temporary" relief traditionally granted by courts of chancery to *maintain* the *status quo* pending hearing. These orders authorize the establishment of new rates; they change the *status quo* — before hearing.

To say that they authorize the establishment and maintenance of rates, is to say what they expressly say themselves (R. 14, 16, 17, 19). Under the terms of Section Four, it is only with the authorization of the Commission (authorization which such orders purport to give) that rates departing from the long-haul-short-haul provision of the Fourth Section can be charged at all by the Railroads. (*Intermountain Rate Cases*, 234 U.S. 476, 485-486 (1914); *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 566 (1919)). If Congress constitutionally could lodge in any public agency an arbitrary power to per-

form the legislative act of authorizing rates without regard to standards prescribed by Congress itself (and surely it could not, *Panama Refining Company* v. *Ryan*, 293 U.S. 388, 433 (1935)), it is plain that Congress has not undertaken to invest the Commission with power to authorize rates that disregard its otherwise universal prohibition of rates departing from the Act's long-haul-short-haul provision *without regard to the standards* prescribed by the Interstate Commerce Act to govern such action. Section Four itself (49 U.S.C. § 4(1)) prescribes that "in exercising the authority conferred upon it in this proviso" (namely the authority to authorize Fourth Section departure rates) the Commission "shall not" permit the establishment of a rate that is not reasonably compensatory; and the opening phrases of the proviso in their context mean that a "special case" must be established as the required basis for the exercise of such power. *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557 (1919). Since the enactment of the Transportation Act of 1940, the Commission may exercise this power only subject to and in accordance with the National Transportation Policy, which requires that it shall authorize only rates that are not destructively competitive, and that preserve the inherent advantages of competing forms of transportation. National Transportation Policy, 54 Stat. 899, 49 U.S.C., note preceding Section 1; *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, 574, 577, 579-580 (1947); *Dixie Carriers* v. *United States*, 351 U. S. 56, 59, (1956).

It is well settled that no order of the Commission affirmatively authorizing rates under statutory standards is a lawful order unless it contains findings of fact which enable a reviewing court to perceive that the Commission did (or did not) relate its action in the particular circumstances of

the very case to the prescribed statutory standards governing its actions (*Florida* v. *United States*, 282 U.S. 194, 212, 215 (1931); *United States.* v. *Chicago, Milwaukee & St. Paul R. Co.*, 294 U.S. 499, 504-505 (1935); see *Alabama Great Southern Ry.* v. *United States*, 340 U.S. 216, 228 (1950)). It is the will of Congress that the acts of administration shall be subject to judicial review to determine whether they are, or are not, within the boundaries of the legal standards that Congress has prescribed, 28 U.S.C. §§2231-2325, 2284; Administrative Procedure Act, 5 U.S.C. §1009; §1007(b)). That will cannot be carried out, unless the administrator, by findings of fact, discloses how it has—or has not—related its action to those standards in the very case. Therefore findings of fact are essential to the lawfulness of an order authorizing rates under statutory standards. *Florida* v. *United States, supra; United States* v. *Chicago, Milwaukee & St. Paul R. Co., supra.*

This is plainly necessary if the standards Congress has prescribed to govern administrative action (which standards alone prevent its delegation of power to administrators from being a void delegation of legislative power) are to be effective controls over administrative action. This Court has rested the requirement that administrators shall make such essential findings of fact, not only on the legislative will that there shall be effective judicial review of administrative action, but also on fundamental principles of constitutional government. *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 433 (1935). In this case the administrators authorized a rate without making any findings at all (and it admittedly follows the practice of doing so).

Over and above the foregoing, it appears by the record in this extraordinary case that the Commission authorized

this rate before it was able to reach its own conclusion as to whether the circumstances warranted such action under standards of the law as it, itself, understands those standards. Section Four forbids it to authorize lower rates for longer hauls if such rates are not "*reasonably* compensatory." That is a statutory standard for its action that it understands as follows:

> "In the light of these and similar considerations, we are of the opinion and find that in the administration of the fourth section the words 'reasonably compensatory' imply that a rate properly so described must (1) cover and more than cover the extra or additional expenses incurred in handling the traffic to which it applies; (2) be no lower than necessary to meet existing compensation; (3) not be so low as to threaten the extinction of legitimate competition by water carriers; and (4) not impose an undue burden on other traffic or jeopardize the appropriate return on the value of carrier property generally, as contemplated in section 15a of the Act."

Transcontinental Cases of 1922, 74 I.C.C. 48, 71 (1922)

The Commission not only made no findings under that, or any other, standard of the Act *on the same day* that it authorized these Fourth Section departure rates, but it found that, on consideration of the protests against them, an investigation was necessary, and assigned the matter for hearings *to be held later.* It authorized the rates *before* the investigation that it found was necessary (and, which it never concluded).

We submit that the Commission was right in finding that an investigation was necessary and that the necessary investigation was by hearing. When protests are filed against the authorization of Fourth Section departure rates (rates

that can do damage such as that described at Record 59-60) even due process requires a hearing. Water carriers are at least entitled to a hearing before they are subjected to ruinously destructive competitive rates. It was precisely by lower rail rates for longer rail hauls that the Railroads ruined the water carriers once before, and this was "one of the main factors" which precipitated the creation of the Interstate Commerce Commission in 1887. (*Petroleum Products from New Orleans, La. Group*, 194 I.C.C. 31 (1933) at 44-45, per Eastman, Commissioner.) These rates were authorized to be established and maintained before any hearings, before even a time for hearing had been set.

The Commission and the Railroads have hitherto been able to evade final adjudication as to the legality of this practice. Between them they can always end the term of the order wherever judicial determination appears immiment—the Commission by entering an order with findings often denying further Fourth Section relief, or the Railroads, by changing the rates so as to eliminate the Fourth Section departure. But that does not redress the damage suffered from the rates in the meantime, nor does it leave any possibility of recovering total damage, for the order that authorizes the rates is not vacated and it cannot be collaterally attacked. Nor does it leave the injured water carriers with any prospect for the future except the certainty that the continuing injurious practice (on whose legality the Commission and the Railroads flatly insist) will be repeated to their continuing injury.

The Commission and the Railroads again insist that by changing their rates and withdrawing their Fourth Section Application (without, however, vacating the Fourth Section order), they have ended the controversy and again kept the practice beyond the reach of the judicial power of the United States—have rendered the case "moot."

This case (unlike others) squarely alleges (R. 11) that "* * * the Commission still follows the practice of entering such orders without supporting findings" and challenges the practice as well as the order which is an instance of it.[8]

I.

THE COURTS RETAIN JURISDICTION OF THIS PROCEEDING TO REVIEW THE UNVACATED F.S.O. 19059 DESPITE THE ATTEMPT OF APPELLEES TO AVOID JUDICIAL REVIEW OF A RECURRENT AND CONTINUING COMMISSION PRACTICE.

A. Even If Appellants Had No Further Interest In F.S.O. 19059, The Controversy Would Still Be Justifiable And The Court Would Retain Jurisdiction.

It is apparent that the controversy between appellants and appellees over the continuing practice of the Commission in granting "temporary" authority for Fourth Section departures to the Railroads over the protests of the appellants and without any hearing or findings in the order granting such authority continues and will continue so long as the Railroads continue to use this device to divert substantial amounts of traffic from the appellants. This controversy over a continuing practice is justiciable. *Carpenters' Union* v. *National Labor Relations Board*, 341 U.S. 707, 715 (1951); *Cf. Public Utilities Commission of California* v. *United States*, 355 U.S. 534 (1958), *rehearing denied*, 356 U.S. 925.

When the Railroads reduced their intermediate rates and withdrew their Fourth Section application after F.S.O. 19059 had been in effect for fourteen months, they did so

---

[8] The answers do not deny the averment (R. 11, 31, 39) that the Commission still follows this practice. The failure to deny the averment admits it. Fed. R. Civ. P. 8(d).

with the intention of ousting the courts of jurisdiction to review the order. In the past, as here, defendants have sought to oust a court's jurisdiction properly obtained and prevent judicial review of their repeated action by putting an end to the action and its effects for the time being without giving any promise or indication, even circumstantially, that the action would not be repeated in the future. When the plaintiffs complaining of the action have not agreed to, or connived at, such cessation of the disputed action, this Court has uniformly refused to yield its jurisdiction in such circumstances. When, as here, the action involved is one by a regulatory agency of great importance to the transportation industry and to the public generally, this Court has regarded the public importance of the action as additional reason for retaining jurisdiction and rendering a definitive decision on the propriety of the action.

The Commission itself was the defendant in two of the first of these cases. In *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498 (1911) and in *Southern Pacific Company* v. *Interstate Commerce Commission*, 219 U.S. 433 (1911) questions were raised regarding orders entered by the Commission for a period of two years only and before judicial review of these orders could reach this Court, the two year period of the orders had expired. In each case the Commission sought to have this Court dismiss the proceedings as being moot. In each case this Court refused, succinctly stating in the first-cited case its disapproval of any idea that there could be a no-man's-land of "temporary" or short term orders as to which ultimate judicial decision on review could be evaded at will by the Commission:

> "The *questions* involved in the orders of the Interstate Commerce Commission are usually continuing (as

are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress." (Emphasis added)

Southern Pacific Terminal Co. v. *Interstate Commerce Commission*, 219 U.S. 498, 515 (1911).

The principle that judicial review of unlawful administrative or official action properly invoked must not be barred by the short term nature and lapse of a specific instance of such action when it can be repeated in the future to the injury of those seeking review, has been invoked repeatedly by this Court and the lower federal courts. *Walling* v. *Helmerich & Payne*, 323 U.S. 37, 43 (1944); *McGrain* v. *Daugherty*, 273 U.S. 135, 180-182 (1927); *Gay Union Corporation* v. *Wallace*, 112 F.2d 192 (D.C. Cir., 1940), *cert. den.*, 310 U.S. 647; *Dyer* v. *Securities & Exchange Commission*, 266 F.2d 33, 46-47 (8th Cir., 1959) *cert. den.*, 361 U.S. 835 and 911; *Papoliolios* v. *Durning*, 175 F.2d 73 (2d Cir., 1949); *Boise City Irrigation & Land Co.* v. *Clark*, 131 Fed. 415 (9th Cir., 1904); and see cases cited in Diamond, *Federal Jurisdiction To Decide Moot Cases*, 94 U. Pa. L. Rev. 125, 136 (1946). This same principle has been followed with respect to unlawful actions by individuals who have ceased the unlawful action only after the scrutiny of the court was invoked, but have neither circumstantially nor by direct promise shown that the action was unlikely to recur in the future. *United States* v. *W. T. Grant Co.*, 345 U.S. 629 (1953); *Carpenters Union* v. *National Labor Relations Board*, 341 U.S. 707, 715 (1951); *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 447-448 (2d Cir., sitting as a

court of last resort, 1945); *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290, 308 (1897).

The circumstances which this court emphasized in its decision in the *Southern Pacific* cases as requiring retention of its jurisdiction, and which have been adverted to in various of the later decisions on this point are all present in the case now before the Court.

1. The question involved is one of a continuing nature since the appellees have each admitted by their answers to Paragraph 19 of the Complaint that the Commission's practice of entering such orders continues, and their efforts to prevent judicial review of F.S.O. 19059 while insisting on its entire legality, indicate their purpose to continue the practice in the future.[6]

2. The orders continue in effect for terms too short under normal circumstances to allow sufficient time to complete judicial review, the periods being very similar to the

---

[6] In many of the cases involving cessation of illegal activity by defendants who were not governmental agencies, the determination of the likelihood that the action in question would be resumed in the future has been the point receiving the most attention from the court. See e.g., United States v. W. T. Grant Co., 345 U.S. 629, 633, 635 (1953); United States v. Oregon State Medical Society, 343 U.S. 326, 333 (1952); United States v. Aluminum Company of America, 148 F.2d 416, 447-448 (2d Cir. sitting as a court of last resort, 1945); Diamond, Federal Jurisdiction to Decide Moot Cases, 94 U. Pa. L.Rev. 125, 146 (1946). Apparently this emphasis arises in cases that meet the other requirements enumerated except for the public importance of the question involved. In any event, there is here not the slightest suggestion by the Commission that this practice has ended. Quite the contrary, the Commission admits on the pleadings that it continues to follow the practice, and insists by its answer on the legality of that practice as it is illustrated by the instance thereof described in the complaint. (R. 31, Pars. XII and XIII).

two year orders involved in the *Southern Pacific* cases,[7] which continue to be entered by the Commission.

3. The public character of the question involved is apparent since the orders of the type involved are having, and are designed to have, marked effect on the distribution of traffic among various modes of regulated public transportation.

4. The reviewing court's jurisdiction properly attached originally, since appellees have not contended that the complaint was not properly filed in the court below.[8]

5. The situation alleged by appellees to have made the case moot was created by voluntary action of the appellees themselves without any consent or cooperation from, or fault of, the appellants.[9]

---

[7] F.S.O. 19059 in the present case was in effect for fourteen months without further order of the Commission. The order under review in **Dixie Carriers v. United States**, 143 F.Supp. 844 (1956) was not superseded by further order of the Commission until two years after its entry, although it was annulled by the three-judge court during that time. The "temporary" order mentioned in **Corn & Corn Products, Illinois to Official Territory**, 310 I.C.C. 437, 438 (1960) was in effect about three years before it was superseded by further order of the Commission. Other "temporary" orders entered over protest and without findings or hearing described in the Affidavit of Wesley A. Rogers (R. 54) range in duration from seven to eighteen months for cases still waiting for first hearing or for superseding order of the Commission.

[8] That this Court emphasized this circumstance is made plain at 219 U.S. 516.

[9] The court discussed the fact that if a case is to become moot, it must be because of some occurrence without fault of the defendant at page 514, emphasizing this fact again and the lack of plaintiff's participation in bringing about the occurrence when it discussed the **Trans-Missouri Freight Association** case at 219 U.S. 515-516.

It has been particularly characteristic of previous attempts to obtain definitive judicial review of the Commission's "temporary" Fourth Section orders entered without hearing or finding over the protest of the injured plaintiffs, that the Railroad and the Commission alone have acted to prevent decision by this Court or by the lower court. Thus in *Coastwise Lines* v. *United States*, 157 F. Supp. 305, 306 (1957), *American Commercial Barge Line Company* v. *United States*, Civil No. 11772 (S.D. Tex., 1959) and in this case the Railroads have withdrawn their Fourth Section applications rather than submit the Commission's "temporary" order to judicial review of a three-judge court. In *Dixie Carriers* v. *United States*, 355 U.S. 179 (1957) the Commission obtained vacation of the adverse order of the three-judge court by entering a superseding order while the case was pending before this Court. It followed a similar practice in *United States* v. *Amarillo-Borger Express*, 352 U.S. 1028 (1957), although the "temporary" order in that case did not involve a Fourth Section application.

In none of these cases prior to the present case had the plaintiffs alleged in their complaints that the Commission's order was an example of a continuing practice by the Commission, and they therefore had no basis for invoking the doctrine of the *Southern Pacific* cases which maintains the jurisdiction of the courts. It was precisely because of this experience that the allegations of Paragraph 19 were included in the present complaint to avoid another failure to press to ultimate judicial decision the question of the propriety of such Commission orders.[10]

---

[10] Such a decision by this Court appears to be necessary since, as alleged in Paragraph 19, the Commission has ignored the well-reasoned opinions by the three-judge courts in

B. Appellants Have A Continuing Interest In Having F.S.O. 19059 Vacated Since It would Be a Defense To Any Action By Appellants Against The Railroads For Damages Suffered From The Railroads' Fourth Section Departure Rates.

In *Southern Pacific Terminal Company*, Justice McKenna recognized that the unvacated order of the Commission might possibly have some future effect but based the court's continuing jurisdiction to review the order on the broader considerations discussed above.[11] In *Southern Pacific Company*, after stating that *Southern Pacific Terminal Company controlled* on the question of mootness, Chief Justice White added as an additional reason for retaining jurisdiction the effect of the Commission's order on suits for reparations against the Railroads and "the influence and effect which the existence of the rate fixed for two years, if it were legal, would have upon the exercise by the rail-

---

[10] (Continued)

Dixie Carriers v. United States, 143 F. Supp. 844 (S.D.Tex., 1956), remanded as moot on appeal, 355 U.S. 179, and in **Seatrain Lines v. United States**, 168 F. Supp. 819 (S.D.N.Y., 1958), which held that these "temporary" orders without findings are improper. In two other unreported cases the courts have divided, one court temporarily restraining such an order until the Fourth Section applications before the Commission were withdrawn (**American Commercial Barge Line Company v. United States**, S.D.Tex., Civil No. 11772) and the other granting a motion to dismiss the action on the ground that the order was not reviewable (**A. L. Mechling Barge Lines Inc. v. United States**, N.D. Ill., Civil No. 57 C 1450). The latter case did not hold that the order was proper, but only that it was not reviewable, and there thus appears to be no way to get review of such orders in the Seventh Circuit, leaving parties resident in this circuit entirely without relief from the provisions of such orders.

[11] 219 U.S. 514-515.

roads of their authority to fix just and reasonable rates in the future."

In this case a similar situation exists in that the Commission has not vacated F.S.O. 19059 and it now stands as the sole authorization for rates which without such authorization are illegal. *Intermountain Rate Cases,* 234 U.S. 476, 485-486 (1914); *United States* v. *Louisville & Nashville Railroad Co.,* 235 U.S. 314, 322-323 (1914); *Skinner & Eddy Corp.* v. *United States,* 249 U.S. 557, 566 (1919); *Patterson* v. *Louisville & Nashville Railroad Co.,* 269 U.S. 1, 11 (1925). Until the order is vacated, no attack can be made upon the Railroads for charging such rates, since such an attack would be an attack on the order itself. *Lambert Run Coal Company* v. *Baltimore & Ohio R.R. Co.,* 258 U.S. 377, 380, 382 (1922); *Venner* v. *Michigan Central Railroad Co.,* 271 U.S. 127, 130 (1926). Such collateral attack on Commission orders is not permitted, actions to review Commission orders being required to be brought directly in the manner provided by federal statutes. *Venner* v. *Michigan Central Railroad Co., supra; Callanan Road Company* v. *United States,* 345 U.S. 507, 512-513 (1953); *Simpson* v. *Southwestern Railroad Company,* 231 F.2d 59, 62 (5th Cir., 1956), *cert. den.,* 352 U.S. 828.

Thus until it is reviewed and vacated, F.S.O. 19059 stands as a bar to any action by these appellees for damages caused by unlawful action of the Railroads as provided in Section 8 of the Interstate Commerce Act (49 U.S.C. §8). As indicated by Justice McKenna in *Southern Pacific Terminal Co.,* the extent of appellants' right to such dam-

---

" 219 U.S. 452.

ages need not be defined,[13] and, indeed, is a collateral issue which cannot properly be made a subject of this proceeding. The point is that appellants should be able in appropriate proceeding under Section 8 to have their right to such damages determined, and they cannot do so as long as F.S.O. 19059 remains unvacated.

C. Relief By Way of Declaratory Judgment Is Available Under Section 10(b) Of The Administrative Procedure Act As A Supplement To Injunctive Relief.

Section 10 of the Administrative Procedure Act, 5 U.S.C. §1009, provides that, except in two circumstances not applicable here, *any* person adversely affected or aggrieved by *any* agency action within the meaning of any relevant statute shall be entitled to judicial review of such action. In the absence or inadequacy of any relevant special statutory review proceeding, any applicable form of legal action, specifically including actions for declaratory judgments among others, shall be available as a form of proceeding.[14]

---

[13] "In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings." **Southern Pacific Terminal Co. v. Interstate Commerce Commission**, 219 U.S. 498, 515.

[14] Pertinent portions of Section 10 are as follows:

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion:

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competeent jurisdiction. * * *" (5 U.S.C. § 10009)

The Urgent Deficiencies Act, 28 U.S.C. §§2321-2325 and 2284, provide an injunctive form of judicial review in an action against the United States before a three-judge district court for orders of the Commission.[15] Appellants have, of course, invoked this form of judicial review, and as seen from the foregoing, continue to press to have F.S.O. 19059 set aside. Fearing, however, that the injunctive relief might be inadequate,[16] the plaintiffs below included in Paragraph 19 a plea for a declaratory judgment on various questions involved in testing the propriety of F.S.O 19059. Such questions are not only pertinent to the decision with respect to F.S.O. 19059, but to future conduct of the Commission in implementing its intention to continue issuing "temporary" Fourth Section orders like F.S.O. 19059. Such declaratory relief would be precisely that useful supplement to the remedy provided by the Urgent Deficiencies Act which Section 10(b) of the Administrative Procedure Act was designed to afford. Its use here will most effectively ensure the compliance of the Commission and avoid the necessity for invoking the harsh injunction proceeding to review further orders of the Commission that are requested

---

[15] From the direction in 28 U.S.C. §2322 that suits to review Commission be brought against the United States and the permission in Section 10(b) of the Administrative Procedure Act to supplement the statutory form of proceeding with pleas for declaratory relief when the statutory proceeding is inadequate, it may be seen that the United States has consented to suits of this kind against itself.

[16] If a complaint states facts which will support two different legal bases for relief, either one may ultimately be made the theory of the plaintiffs' case. Park & Tilford v. Schulte, 160 F.2d 984 (2d Cir., 1947), cert. den. 332 U.S. 761; Reconstruction Finance Corporation v. Goldberg, 143 F.2d 752 (7th Cir., 1944), cert. den., 323 U.S. 770; Keiser v. Walsh, 118 F.2d 13 (D.C. Cir., 1941); Pennsylvania R. Co. v. Munsante-Phillips, Inc., 42 F. Supp. 340 (N.D. Calif., 1941); Gay v. E. H. Moore, Inc., 26 F. Supp. 749 (ED.Okla., 1939).

by the Railroads under the circumstances specified in the Complaint's prayer for declaratory judgment, and will serve as a guide to both the Commission and an important national industry on the legal requirements in proceedings of this kind. The declaratory judgment is available as an additional form of review when the right to review already exists. *Brownell* v. *Tum We Shung*, 352 U.S. 180 (1956); *Raydist Navigation Corp.* v. *United States*, 144 F. Supp. 503, 505 (E.D. Va., 1956). If no other form of proceeding can afford quite the form of relief needed, that is no bar to, but rather a reason for granting declaratory relief. *Order of Railway Conductors* v. *Swan*, 329 U.S. 520 (1947).

Thus there is good reason for granting the declaratory relief prayed in the complaint in order to settle a controversy which has vexed Commission, Railroads and Barge Lines for over five years and gives certain promise of continuing to be vexatious if this Court does not settle the important questions presented.

II.

F.S.O. 19059 IS VOID BECAUSE, DESPITE APPELLANTS' PROTESTS, IT CONTAINS NONE OF THE FINDINGS REQUIRED BY LAW TO SHOW ANY FACTUAL OR LEGAL BASIS FOR CONCLUDING THAT THE RATES AUTHORIZED COMPLY WITH THE REQUIREMENTS OF SECTION 4 OF THE INTERSTATE COMMERCE ACT OR OF THE NATIONAL TRANSPORTATION POLICY.

F.S.O. 19059 contains no findings of fact or conclusions of law. The order, other than the ordering pargarphs, consists of a ten-line dependent clause which is pertinent to this point only in that it refers to the Railroads' Fourth Section application as amended and purports to make it a

part of the order. The order contains no findings as to which, if any, of the matters stated in the application are true, ignores completely the fact that protests had been filed as well as the facts alleged in the various protests filed, and contains no conclusions of law nor any other indication that the Commission is even aware of the statutory prerequisites to the grant of Fourth Section relief. The Commission expressly states that it does not approve the rates and makes them subject to correction if in conflict with any provision of the Interstate Commerce Act. Nevertheless it authorizes the rates, and the injury they are designed to do to the Appellants.

The mere reference to the application made in the order cannot supply the lack of findings. This Court quoted with approval the following pertinent language in *Panama Refining Company* v. *Ryan*, 293 U.S. 388 (1935), at p. 433:

> "It is pressed on us that the lack of an express finding may be supplied by implication and by reference to the averments of the petition invoking the action of the Commission. We can not agree to this."

The omissions of findings are in direct violation of long standing requirements for the validity of administrative action. Principles of constitutional government require an administrative delegate of Congress to make findings showing how it related its action to the standards under which Congress authorized it to act. Without such findings the order is void.

> "'We held that the order in that case made after a hearing and ordering a reduction was void for lack of the express finding in the order. We put this conclusion not only on the language of the statute but also on general principles of constitutional govern-

ment.'" *Panama Refining Company* v. *Ryan*, 293 U.S. at p. 433, quoting with approval *Mahler* v. *Eby*, 264 U.S. 32, 44 (1924).

Since the requirement is constitutional, neither the language of any statute nor consideration of administrative convenience can abrogate it. In *Alabama Great Southern Railway Co.* v. *United States*, 340 U.S. 216, 228 (1950), this Court held that Section 14(1) of the Interstate Commerce Act, which requires the Commission to state its findings in cases involving an award of damages and its conclusions after all investigations, does not relieve the Commission of the duty in a case not involving an award of damages to make these basic "findings essential to an order."

The statutory standards here must be met for unless the Commission authorizes the rates as provided by law, the Railroads cannot lawfully charge them. *Intermountain Rate Cases*, 234 U.S. 476, 485-486 (1914); *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 566 (1919). These standards are that (1) a "special case" must exist, (2) the lower rate for the longer haul must be "compensatory" (Section 4(1), Interstate Commerce Act, 49 U.S.C. §4(1)), and the lower rate must not be destructively competitive and must preserve the "inherent low-cost advantage" of the competing water transportation (National Transportation Policy, 49 U.S.C., Note Preceding §1; *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, 574, 577, 579, 580 (1947)). Yet the order in question has no finding, conclusion, or any statement of the Commission's basis for action with respect to any of these prerequisites.

Such absence of findings has been held to make the orders unlawful both before and after the enactment of

Section 8(b) of the Administrative Procedure Act (5 U.S.C. §1007(b)).[17] A partial list of cases so holding includes *Florida* v. *United States*, 282 U.S. 194 (1931); *United States* v. *Baltimore & Ohio Railroad Co.*, 293 U.S. 454 (1935); *United States* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 294 U.S. 499, 504-505 (1935); *North Carolina* v. *United States*, 325 U.S. 507 (1945); *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.* v. *Illinois*, 355 U.S. 300 (1958); and see the legislative history of Section 8(b) in *Amarillo-Borger Express* v. *United States*, (N.D. Tex., 1956) 138 F. Supp. 411, Note 13 at pp. 418-419. There, of course, can be no doubt that the Administrative Procedure Act applies to the Commission. *Minneapolis & St. Louis Railway Co.* v. *United States*, 361 U.S. 173, 192 (1959).

F.S.O. 19059, containing no findings of fact whatsoever despite the protests of appellants and others, does not comply with the constitutional and statutory requirement that it reveal its factual and legal basis in such manner as to enable a court to review intelligently whether it complies with the statutory prerequisites to the issuance of Fourth Section orders.

---

[17] Section 8(b) provides as follows in pertinent part as follows:

> "* * * All decisions (including initial, recommended or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all material issues of fact, law, or discretion presented upon the record * * *."

III.

F.S.O. 19059 IS VOID BECAUSE, CONCURRENTLY WITH INSTITUTING AN INVESTIGATION INTO THE LAWFULNESS OF THE RATES WHICH IS REQUIRED BY SECTION FOUR OF THE INTERSTATE COMMERCE ACT BEFORE THE RATES MAY BE AUTHORIZED, THE COMMISSION ISSUED F.S.O. 19059 AUTHORIZING THE RATES.

On the same day that the Commission entered its original order in this proceeding authorizing these rates to be established forthwith, it entered an order instituting an investigation "into and concerning the lawfulness of the rates, charges, rules, regulations and practices contained in" the rate schedules in connection with which the Railroads had filed their Fourth Section application (R. 21). Similar investigations were ordered concurrently each time orders supplementing F.S.O. 19059 were issued (R. 22-27). At the same time the Commission made F.S.O. 19059 effective "until the effective date of the further order to be entered after hearing in fourth-section application No. 35140," and similarly the supplements to F.S.O. 19059 were made so effective.

As is the Commission's usual practice, hearings in the fourth section proceeding and the investigation were subsequently held by the same Examiner simultaneously, making a single record for both proceedings. Thus it is apparent that at the time F.S.O. 19059 was entered the Commission had not completed an investigation which it considered necessary to determine the lawfulness of the rates, and that its actual investigation into that question was started *after* F.S.O. 19059 was entered and never completed (without resulting in any further order).

This practice clearly does not comply with Section Four's requirement that orders authorizing Fourth Sec-

tion departure rates be entered only upon application by the carrier and *after* investigation has shown that a special case exists.[18] It is not enough just for the carrier to make application, as the Commission's orders show was done here.

When, as here, the carriers' application discloses that the purpose of the rates is to divert traffic from other common carriers regulated by the Commission, and those carriers (as well as many affected shippers) protest against grant of the requested authority, the Commission's investigation must be in the form of a hearing in order to give the protesting carriers opportunity to confront and cross-examine those witnesses whose testimony is to be used as a basis for depriving the protestants of their revenues. In such cases "the requirement of Section 4 that authorization shall be made, if at all, 'after investigation' clearly implies that the question shall be determined upon testimony and after a hearing." *Louisville & Nashville Railroad Co.* v. *United States,* 225 Fed. 571, 580 (W.D. Ky., 1915), *aff'md,* 245 U.S. 463 (1918). The positive findings of fact necessary to determine that a special case existed justifying Commission approval of the Fourth Section departures can properly be made in such cases only after evidence has been adduced at a hearing. *Cf. Dixie Carriers* v. *United States,* 143 F. Supp. 844, 854 (S.D. Tex., 1956); remanded as moot, 355 U.S. 176.

The Fifth Amendment itself requires such hearing, for there can be no doubt that this practice of authoriz-

---

[18] The pertinent language of Section 4 is as follows:

"Provided, that upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of persons or property; * * *." (Emphasis added)

ing Fourth Section departures specifically aimed at diverting the traffic of the water carriers to the Railroads can erode away the traffic of the water carriers by successive "temporary" orders until the water carriers can no longer exist. The ability of the Railroads to use their enormously greater financial resources and reservoir of noncompetitive business not available under any circumstances to the water carriers to finance depressed-rate competition with the water carriers under Fourth Section authorizations from the Commission and the inevitable result of such competition, were prophetically noted by Commissioner Eastman in his concurring opinion in the Fourth Section proceeding reported as *Petroleum Products from New Orleans, La. Group,* 194 I.C.C. 31 (1933) at pages 44-45:

> "This promises to be the beginning of a return to a policy of railroad rate making which existed for many years and reached its fullest development in the southeastern portion of the country. That section forms a peninsula surrounded by the navigable waters of the Atlantic Ocean, the Gulf of Mexico, the Mississippi River, and the Ohio River and penetrated by many other navigable streams. The railroads in their early years encountered stiff competition from many steamboat lines plying upon these waters, and they proceeded to meet this competition ruthlessly. Eventually they swept the waters clean of the competing craft, except on the ocean and the Gulf, and even there the competition was greatly weakened.
>
> "This was done by cutting rates where the competition existed, to whatever extent was necessary to paralyze it, at the same time maintaining rates at a very high level elsewhere. The steamboats did not have this reservoir of noncompetitive traffic to help them out, and hence perished in the unequal struggle.

Some large interior cities which did not have water competition were able to utilize the competition of the railroads with each other to break down their rates in somewhat the same manner, but interior points which had little or no competition of any character were out of luck. Their rates were on what the railroads called a 'normal level', which was preposterously high. All this made, of course, for a very uneven development of the country, and it was one of the main factors which precipitated the creation of this Commission in 1887.

"The theory on which the railroads drove out water competition by these low rates was a simple but, as I see it, dangerous theory. They argued that their trains would run anyway, that the added expense of taking on more traffic would be comparatively little, and that if they could get water-competitive traffic at some margin over this 'added' or 'out-of-pocket' expense, it would help them just that much. The danger in this theory is twofold. In the first place, the railroads have always had very imperfect knowledge of this 'added' expense, and in the old days it was more of a theory than anything else. They went out frankly to cut the throats of their water competitors and made the rates whatever was necessary for this purpose. In the second place, the theory places the chief burden of sustaining the profits and credit of the railroads upon the noncompetitive traffic, and this burden is likely to increase progressively. Commerce and industry tend to center at the favored competitive points, and their traffic tends to increase while that at the 'normal rate' points tends to decrease. Gradually the traffic moving on the low rates ceases to be mere 'added' traffic and the 'out-of-pocket' expense swells in volume. So does the burden upon the noncompetitive traffic.

"The danger of following this theory under present conditions is obviously much greater than it was

in the old days, for the trucks, pipe lines, and electric transmission lines have greatly curtailed the amount of strictly noncompetitive traffic.

"After the railroads swept the inland waterways practically clean of competing traffic, two influences set in. One was a public demand upon Congress for appropriations for the improvement of the waterways, so that they could handle traffic more cheaply and efficiently. The other was a gradual revision of the railroad rate structure to a so-called 'dry land' basis, owing to the absence of water competition which could be used to justify fourth-section relief. These two influences have brought a return of the water competition which had disappeared, and it is progressively increasing."

Section 4 is designed to curb such cutthroat competition, and contains provisions disclosing the intent of Congress to protect the competing water carriers.[19] The practice of the Commission in authorizing without any hearing departures for periods of two or three years, even when the departures are avowedly aimed at diverting water-borne traffic and the water carriers protest, has the effect of depriving the water carriers of their traffic without any hearing or opportunity to demonstrate that the injurious rates do not comply with the statutory standards. Such practice thus gives them no effective means for protecting themselves for these periods of time against the loss of traffic effected by the rates. To authorize such injury without affording any opportunity for

[19] Section 4(1) requires that the applicants' departure rates be at least compensatory to the applicants in order to prevent unrestrained cutthroat competition, and further provides that no departures shall be authorized on account of potential water competition. Section 4(2) provides that the depressed departure rates cannot be increased solely because the water competition has been eliminated.

hearing on issues that the barge carriers raise by their protests and on which they ask to be heard is a deprivation of property without due process of law in violation of the Fifth Amendment. *Clarksburg-Columbus Short Route Bridge Co.* v. *Woodring*, 89 F. 2d 788, 790 (D.C. Cir., 1937); remanded as moot, 302 U.S. 658. Although the hearing need not be held at any particular time, it must precede making effective the rate action against which protest is made. *Jordan* v. *American Eagle Fire Insurance Company*, 169 F. 2d 281 (D.C. Cir., 1948).

Thus it may be seen that the Commission obviously had not made, and now never will complete, the investigation which Section 4 requires prior to entry of an order authorizing Fourth Section departures. Furthermore, when the matter involves rates so injurious to water carriers who have protested against authorizing such rates and for whom protection against unrestrained injury is supposed to be provided by the National Transportation Policy and by the conditions in Section 4 itself, the investigation required must afford an opportunity to the water carriers to be heard and to confront and cross-examine the witnesses, if any, in support of the application. The present practice of the Commission results in the loss of business by the barge lines with no effective way to test the compliance of the Railroads' rates with statutory standards, nor even any indication that the Commission has attempted to make the test the statute requires. The Fifth Amendment requires more than this, and so does Section 4.

CONCLUSION.

This case is an attempt to obtain, after some years and many previous abortive, effective judicial review of a Commission practice which has already resulted in great injury to appellants and will, if unchecked, result in even greater injury in the future. The recurring nature of the practice, as alleged in the complaint and admitted by the appellees, together with the refusal of the Commission to vacate F.S.O. 19059 (and its insistence on the lawfulness of the action challenged as unlawful) are more than enough to make the controversy a continuing and justiciable one over which this Court retains jurisdiction.

The utter lack of the required findings in F.S.O. 19059 makes it apparent that the order cannot be sustained and that the Commission's practice of entering such orders over protest is unlawful. Furthermore when, as here, the Commission shows that it authorized the rate before it made the investigation, such an order cannot be sustained. Finally when, as here, the rates are avowedly designed to divert traffic from other carriers and those carriers protest against grant of the authorization, the carriers to be injured are entitled, before the rates are permitted to become effective, to a hearing in which they can present their evidence showing that the rates do not comply with the statutory standard and to test opposing evidence offered by the applicants.

Respectfully submitted,

EDWARD B. HAYES
WILBUR S. LEGG
Attorneys for Plaintiffs-Appellants.

Of Counsel:
LORD, BISSELL & BROOK
135 South LaSalle Street
Chicago 3, Illinois
RAndolph 6-0466

APPENDIX.

Article I, Section 1, Constitution of the United States:

> Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Amendment V, Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The National Transportation Policy, 54 Stat. 899, note preceding the Interstate Commerce Act, 49 U.S.C.:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act [chapters 1, 8, 12, 13, and 19 of this title], so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions:—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 4 of the Interstate Commerce Act, 49 U.S.C. §4:

(1) It shall be unlawful for any common carrier subject to this chapter or chapter 12 of this title to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter or chapter 12 of this title, but this shall not be construed as authorizing any common carrier within the terms of this chapter or chapter 12 of this title to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred

upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *Provided further,* That any such carrier or carriers operating over a circuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this chapter or chapter 12 of this title and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive Points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: *And provided further,* That tariffs proposing rates subject to the provision of this paragraph requiring Commission authorization may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice.

(2) Wherever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.

Section 8 of the Interstate Commerce Act, 49 U.S.C. §8:

In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or

shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Section 8(b) of the Administrative Procedure Act, 5 U.S.C. §1007:

(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions; and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Section 10 of the Administrative Procedure Act, 5 U.S.C. §1009:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

Rights of review

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and venue of proceedings

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Acts reviewable

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

Interstate Commerce Commission Orders, Enforcement and Review Act, 28 U.S.C. §§2321-2325:

§2321. The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States.

§2322. All actions specified in section 2321 of this title shall be brought by or against the United States.

§2323. The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objec-

tion of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

§2324. The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

§2325. An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202:

§2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.